Supreme Court, U.S.
FILED
DEC 28 1999
CLERK

No. 99-826

In the Supreme Court of the United States

OCTOBER TERM, 1999

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

DAVID CHMIEL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPLY TO BRIEF IN OPPOSITION

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

ROBERT A. GRACI
Assistant Executive
Deputy Attorney General
Law and Appeals
Criminal Law Division

Office of Attorney General
2490 Boulevard of the Generals
Norristown, Pennsylvania 19403
(610) 631-6554

RONALD T. WILLIAMSON
Senior Deputy Attorney General
Counsel of Record
Appeals and Legal Services Section
Criminal Law Division

THE PENNSYLVANIA SUPREME COURT DID NOT DECIDE THIS CASE ON AN ADEQUATE AND INDEPENDENT STATE GROUND; ON THE CONTRARY, IT CONCLUDED THAT ITS INTERPRETATION OF THE SIXTH AMENDMENT AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRED THAT RESPONDENT BE GRANTED A NEW TRIAL.

In his Brief in Opposition respondent, David Chmiel (hereafter referred to as "Chmiel"), argued implicitly and incomprehensibly that the Court does not have *certiorari* jurisdiction because the questions presented in the Petition for Writ of *Certiorari* were decided on adequate and independent state grounds involving state evidence law and Article 1, Section 9 of the Constitution of the Commonwealth of Pennsylvania. Const. Art. 1, §9. Even a cursory examination of the Pennsylvania Supreme Court's decision, Pet. App. 1a - 49a, demonstrates that Chmiel's jurisdictional deficiency contention is patently false.

The Pennsylvania Supreme Court found that Kennedy's testimony was admissible as a matter of that state's evidence law. Pet. App. 16a-31a. As to his claim that his state constitutional confrontation rights were violated, the Pennsylvania Supreme Court rejected this claim implicitly on the merits and explicitly on the basis that Chmiel waived such a claim. Pet. App. 33a-34a. Chmiel falsely claims the Pennsylvania Supreme Court "majority decision makes no specific reference to the Sixth Amendment." *See* Brief in Opposition at p. 7. To the contrary, a substantial section of the

state Supreme Court's majority opinion is devoted to a discussion of the components of the "federal Confrontation clause." Pet. App. 32a - 33a. The majority also specifically referred to the "right, guaranteed by the Sixth Amendment to the United States Constitution." Pet. App. 32a. In a further effort to persuade the Court that independent state grounds preclude review by the Court, Chmiel, without any basis in fact, asserts that "[i]t appears as well that the majority decision of the lower court, in addressing the issue of effective assistance of counsel, may well have been relying on Article I, Section 9 of the Pennsylvania Constitution rather than the Sixth Amendment to the United States Constitution." Brief in Opposition at p. 3. Even assuming *arguendo* the accuracy of this assertion, if it is unclear as to whether a state court is relying on an adequate and independent state law ground for its decision, the federal question jurisdiction of the Court will remain secure. *Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996).

The Court clearly has jurisdictional authority to review the Supreme Court of Pennsylvania's erroneous interpretation of the Sixth Amendment and the Fifth Amendment of the United States Constitution in this case as the Supreme Court of Pennsylvania made absolutely no attempt to decide this case on independent state law grounds. *See California v. Freeman*, 488 U.S. 1311, 1313 (1989); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (if "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion", the Court "will accept as the most reasonable explanation that the state court" was relying on federal law and, therefore, the Court will not be precluded from exercising its discretionary *certiorari* jurisdiction); *Texas*

v. Brown, 460 U.S. 730, 732 n.1 (1983) (state court's mention of its own constitution in summarizing Brown's contentions at the outset of the lower court opinion did not constitute an independent and adequate state ground of decision).

CONCLUSION

The Court has jurisdiction to review the questions presented in this petition for writ of *certiorari*.

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

ROBERT A. GRACI
Assistant Executive Deputy Attorney General
Law and Appeals
Criminal Law Division

RONALD T. WILLIAMSON
Senior Deputy Attorney General
Appeals and Legal Services Section
Criminal Law Division

Office of Attorney General
2490 Boulevard of the Generals
Norristown, Pennsylvania 19403
(610) 631-6554

December 28, 1999 COUNSEL FOR PETITIONER